United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

~~1-3130~~
74-1300

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

THOMAS MOORE, ET AL.
Appellant

v.

JOSEPH BETIT, ET AL.
Appellee

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF VERMONT
Docket No. 73-2

BRIEF OF APPELLEE

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I. STATEMENT OF THE ISSUE

The question is whether the District Court was correct in granting Defendants' Motion to Dismiss, made pursuant to Fed.R. Civ. P. 12, because the matter in controversy did not exceed the jurisdictional requisite of 28 U.S.C. §1331.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiffs brought the lawsuit below challenging Vermont's employment practices involving the hiring of welfare recipients and low income persons as subprofessional employees. Vermont's State plans filed with the Department of Health, Education and Welfare, pursuant to certain categorical welfare and medicaid programs that are carried on throughout the State, contain provisions consistent with the Social Security Act for the employment of welfare recipients and low income persons as case aides.

Plaintiffs sought to declare Vermont's policies not in compliance with Federal Statutes and Regulation , namely, 42 U.S.C. §302(a)(5)(B), §602 (a)(5)(B), §1202 (a)(5)(B), §1382 (a)(5)(B), and §1396a (a)(4)(B), and 45 C.F.R. §225.

B. COURSE OF PROCEEDINGS

On January 3, 1973, plaintiffs Thomas Moore and Edward Arbuiso, individually and on behalf of all those other persons similarly situated, filed a complaint in the United States District Court for the District of Vermont, seeking a declaratory judgment that certain employment practices of the State of Vermont are not valid, and injunctive relief, ordering the defendants to provide welfare recipients and low income persons subprofessional employment with the Vermont Department of Social Welfare.

Plaintiffs amended their complaint on March 5, 1973. Vermont Welfare Rights Organization was permitted to intervene on July 27, 1973. On September 20, 1973, as part of a motion to withdraw proposed amendments to the original amended complaint,

plaintiffs withdrew their request for class action status, and Edward Arbuiso withdrew as a plaintiff.

The second amended complaint was filed, (September 20, 1973) leaving two plaintiffs, Thomas Moore and Vermont Welfare Rights Organization, at which time defendants' motion to dismiss for lack of jurisdiction was heard.

C. DISPOSITION BELOW

On December 27, 1973, the Court filed an opinion and order dismissing the action for lack of jurisdiction, namely that plaintiffs' claim did not exceed $10,000 as a jurisdictional requisite of 28 U.S.C. §1331 as alleged in plaintiffs' second amended complaint.

Plaintiffs take appeal from that decision.

D. STATEMENT OF FACTS

The individual plaintiff Thomas Moore, at all times in question, was a recipient of Aid to Needy Families with Children welfare benefits from the Vermont Department of Social Welfare, and did at one

point in time apply for a subprofessional position with the Department of Social Welfare through the Vermont Department of Personnel.

Plaintiff Vermont Welfare Rights Organization allegedly represents individuals who are in some way connected with Vermont's welfare programs.

The Defendants involved are officials of certain State of Vermont departments which are affected with the employment activities in either the hiring or actual employment of welfare recipients and low income persons in subprofessional positions.

Plaintiffs claim that pursuant to the above-mentioned statutory, and regulatory provisions[1] defendants were required to employ certain welfare recipients and low income persons in subprofessional

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[1] The statutes and regulations quoted above read as follows: "For the training and effective use of paid subprofessional staff, with particular emphasis on fulltime or parttime employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of non-paid or partially paid volunteers, a social service volunteer program of providing services to applicants or recipients and assisting any advisory committees established by the state agency."

categories. Defendants responded that they were in compliance of all the above-mentioned authority and that the programs established in accord with the State's plans are continuing to be carried out pursuant to those plans filed with the Department of Health, Education and Welfare. The plans include the use of subprofessional personnel in fulltime and parttime positions with the primary emphasis on recruiting of persons who are either welfare recipients or low income individuals.

It might be wise at this juncture to look at the history of the State's program. In 1969, the Vermont Department of Social Welfare submitted to the U. S. Department of Health, Education and Welfare plans for the employment of subprofessional personnel pursuant to Federal Statutes and Regulation. The plans included the use of subprofessional personnel in fulltime and parttime positions, with primary emphasis in recruiting individuals who were either welfare recipients or low income persons. In fact, the program consisted of recruiting homemakers, who would be trained by the Department's district offices. Also

written into the plans were provisions for an annual progression in the utilization of larger numbers of subprofessionals within the agency's capacity. The initial appropriation was for nine fulltime people; however, it was decided to split the total appropriation into twenty-four parttime positions in order to utilize more personnel.

There are no guidelines in either the statutes or regulation as to what the contents of the state plan should be; and likewise, there are no guidelines for the administration of a State plan once one is created. The only mandate is for the State to create a plan providing "for the training and effective use of subprofessional staff as community service aides..." 45 C.F.R. §225.2. Very little else is said about how extensive and to what degree these plans should be carried out or expanded.

Plaintiffs have claimed that the State has not complied with the spirit and intent of 45 C.F.R. §225.2(a)(5) which mandates the State to have an "annual progressive expansion of the plan to assure utilization of increasing numbers of subprofessional

staff as community service aides, until an appropriate number and proportion of subprofessional staff to professional staff are achieved to make maximum use of subprofessionals in program operation."

Vermont has maintained throughout the proceedings below that the plan, applicable only to community service aide programs in the Social and Rehabilitative Services areas, are necessarily dependent on available appropriations, and consistent with the Merit System requirements. 45 C.F.R. §225.2 (a)(1).

In 1971, the Vermont Department of Social Welfare reviewed the Homemaker program, and decided that employment on a fulltime basis in a new Case Aide Training Program would make better use of the available appropriations. With the shifting of the relevant appropriations in 1971, the Vermont Department of Social Welfare, as part of the United States Family Assistance Program (F.A.P.), a program commonly known as the 1115 Public Social Services Project, began its new Case Aide Program by initially employing seven (7) fulltime temporary subprofessional case aide employees.

At the time, these positions were neither permanent nor within the Merit System, but in September, 1973, the positions were made permanent and brought within the Merit System.

In addition to the increase of man hours in the program, the fiscal year 1975 budget is double that spent in the same program in fiscal year 1970. Finally, the State has contended throughout the proceedings below that it was continually in compliance with its plans as submitted to the Department of Health, Education, and Welfare, and that there were no provision either in Federal or State laws or regulations for the State to employ low income persons or welfare recipients as subprofessionals in the Income Maintenance area, or employ those individuals who are selected for the Social Services programs (Case Aides) outside the Merit System.

III. ARGUMENT

A. PLAINTIFFS HAVE NOT MET THE BURDEN OF PROVING THAT THE AMOUNT IN CONTROVERSY IS IN EXCESS OF THE JURISDICTIONAL REQUISITE OF 28 U.S.C. §1331

It has been widely held that mere allegation of jurisdiction is insufficient, and the party asserting it must be put to the burden of proving that his complaint properly alleges and he can substantiate the jurisdictional fact. In absence of showing proof of the jurisdictional fact, plaintiffs' claim should be dismissed. The party seeking to exercise jurisdiction in his favor must allege this in his pleadings, and if he is challenged, then an inquiry should be made to determine whether the facts support his allegation. See McNutt v. General Motors Acceptance Corporation, 298 U.S. 178 (1936); Spears v. Robinson, 431 F.2d, 1089 (1970); Bishop Clarkson Memorial Hospital v. Reserve Life Insurance Co., 350 F.2d 1006 (1965); Kaufman v. Liberty Mutual Insurance Co., 245 F.2d 918 (1957); Kiernan v. Lindsay, 334 F. Supp. 588 (1971); Flaherty v. McDonald, 178 F. Supp. 544 (1959); Moehl

v. E. I. Dupont DeNeumours & Co., 84 F. Supp. 427 (1947).

Normally, the jurisdictional allegations are sufficient to assert jurisdiction, however, when they are challenged, the "complaint must show that they have substance and are not merely colorable for the purpose of conferring jurisdiction." A. C. McKoy, Inc. v. Schonwald, 341 F.2d 737 (1965); Seaboard Finance Company v. Martin, 210 F. Supp. 121 (1962). Defendants contend that plaintiffs did exactly that. Namely, the complaint alleged jurisdiction under 28 U.S.C. §1331, but went no further. After defendants brought their motion to dismiss, plaintiffs attempted to prove that the matter in controversy exceeded ten thousand dollars, but they failed. They failed for reasons apparent to everyone - everyone, that is, except plaintiffs.

First, plaintiffs were never sure of the direction to be taken in their pursuit of the action below. They amended their complaint several times, and eventually dropped the class action caption. The highlight of their confusion is their inconsistent

claim with respect to the satisfying of the jurisdictional requisite. On the same day, September 19, 1973, plaintiffs submitted two documents, one entitled A Memorandum in Opposition to Defendants' Motion to Dismiss and the other entitled Plaintiffs' Trial Memorandum of Facts and Law. These papers clearly demonstrate plaintiffs' uncertainty.

In the former document at 2, plaintiffs state:

> "In their Amended Complaint, the Plaintiffs have dropped their class action allegations and thus the question of aggregation of claims is no longer opposite (sic). Rather the question to be answered here is whether the plaintiffs, standing individually, raise claims which may be valued in excess of $10,000, for if they do, the jurisdiction of this Court is clearly established under 28 U.S.C. §1331. Snyder v. Harris, 394 U.S. 332 (1968)."

In the latter document at 5, plaintiffs state:

> "Finally, plaintiffs will prove that the worth of their claim is in excess of $10,000, and that while no individual plaintiff would in and of themselves be entitled to a job if suit were brought individually, all plaintiffs and members of the class have an individual interest in the right to have the Defendants operate a program of hiring welfare recipients and other low income persons in 'subprofessional' jobs."

In substance, plaintiffs first claim that they have dropped their class action status and therefore, since the aggregation question is no longer relevant, each individual plaintiff must prove that claim in controversy exceeds ten thousand dollars. Plaintiffs then claim that "while no individual plaintiff would in and of themselves be entitled to a job if suit were brought individually..." the Court must aggregate these claims. How can one allege jurisdiction, and then admit that the individual can not bring the action by himself, when in fact that is being done?

B. <u>THE MERE UNAVAILABILITY OF JOBS IS TOO SPECULATIVE TO MEASURE IN TERMS OF THE MONETARY JURISDICTIONAL REQUISITE</u>.

Considering the above inconsistency, have the plaintiffs established by the preponderance of the evidence that they have met the jurisdictional requirement? In order to determine the answer to that question, it is necessary to look at "what the matter in controversy is, or the matter upon which the action

is brought, and the issue is joined." Smith v. Adams, 130 U.S. 167 (1889). See Generally, 30 ALR 2d 602. In the instant case, is the matter in controversy the job, the right to a particular job, or the right to have a particular job created? Clearly, the District Court found the matter to be the lack of availability of certain jobs, and not the job or the right to existing jobs. See Opinion, at App. A-55. Defendants agree that the "right," if one exists, is to be measured by what loss, if anything, plaintiffs incurred because of the unavailability of jobs to them, as individuals.

Generally, Courts have looked at either of two approaches in attempting to determine the value of the right. The first approach is the "value to plaintiff test," in which one looks, from plaintiffs' viewpoint, to either what is the object sought to be gained, or to be protected. See 30 A.L.R. 2d, supra at 629. The second test and by far the last popular is to look at what the defendants stand to lose. See 1 Moore Federal Practice §0.91[1].

In the current situation, due to the nature of the case, namely the request for injunctive relief,

the only valid approach is to look at the "value of the plaintiff test," in order to determine what the right sought to be protected is. Kheel v. Port of New York Authority, 457 F.2d. 46 (1972; Massachusetts St. Pharm. Ass'n. v. Federal Prescrip. Service, Inc. 431 F. 2d. 130 (1970); Pyramid Life Ins. Co. v. Masonic Hosp. Ass'n. of Payne Co., 191 F. Supp. 51 (1961); Empire Box Corp. v. William Sulzburger Motor Co., 104 F. Supp. 762 (1952); Minor v. City of Keokuk, Iowa, 92 F. Supp. 833 (1950).

"The matter in controversy must be money, or some right, the value of which can be estimated and ascertained in money and which appears to be of the requisite pecuniary value." Collins v. Public Service of Missouri, 129 F. Supp. 722, 729 (1955). See also Boyd v. Clark, 287 F. Supp. 561 (1968); Giancana v. Johnson, 335 F.2d. 366 (1964).

Can the value of the right of unavailable jobs, or of nonexistent jobs be ascertained, or is it pure speculation? Where in the record do plaintiffs assert any more than the bare bones allegation that the right is worth in excess of the jurisdictional requisite. Collateral matter, such as possibilities

of getting jobs are clearly speculative, and do not attach weight to the matter in controversy; only matters directly in dispute can be considered, Murphy v. G. C. Murphy Co., 216 F. Supp. 124 (1963).

At the very most, even if we assume that plaintiffs received positions under the subprofessional program those positions would not earn plaintiffs enough of difference over their current or other potential employment to gain them the monetary jurisdictional requisite.

Plaintiffs' claim is too speculative. It has been generally held that future claims and demands which are contingent in nature and may never accrue can not be included in determining the amount in controversy. Rosado v. Wyman, 414 F.2d 170 (1969), (Rev'r. on other grounds); Yoder v. Assinibaine and Sioux Tribes of Fort Peck Ind. Res., 339 F.2d. 360 (1964); Troy Laundry Co. v. Lockwood, 63 F. Supp. 384 (1945); See Generally 1 Moore Federal Practice §0.92[5].

Plaintiffs' claim here is contingent at best. Even if some or all of the sixteen existing positions were vacant, and even if new positions, in an amount

satisfactory to plaintiffs, were created, there is no assurance or certainty, and to what degree of probability we can not speculate, that Plaintiff Moore or Plaintiff Vermont Welfare Rights Association's members would qualify or be eligible under the Merit System for any of these positions. We would have to be speculative at each assumption.

The jurisdictional requisite of 28 U.S.C. §1331 is based on actuality not prophecy. "Speculative anticipation that conditions from which the present ills not now sufficient in amount to give jurisdiction, flow, may in time aggregate the necessary amount, will not support jurisdiction." Vicksburg S&P. Ry. Co. v. Nattin, 58 F.2d 979 (1932). See also, Dermody v. Smith et.al , 88 F. Supp. 620 (1949); American Distilling Co. v. City of Sausolito, 73 F. Supp. 520 (1947). The case of Yoder v. Assinbaine and Sioux Tribes of Fort Peck Indian Reservation, Montana, supra, involved the question of whether injunctive relief should be given in the nature of restraining the Montana Oil and Gas Commission from enforcing an order. After reviewing McNutt, supra, the Court held

that plaintiffs have not met their burden because the matter in controversy was too speculative to value. They went on to say that the right involved was not the value of the land in question, but was the right to future royalties. Analogously, the right in the present case is not the value of jobs that are established by the subprofessional program, but the right to jobs that may or may not be available. In both cases, there must be prophecy as to something that might or might not exist in the future, and hence can not be measured for jurisdictional purposes.

As it was held in Kiernan v. Lindsay, supra, after quoting Barry v. Mercein, 46 U. S.(5 How.) 103 (1847) and, "it is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal court where the applicable jurisdictional statute requires that the matter in controversy exceed certain number of dollars," the Court at 594 concluded that where they could not apply a "formulae which could reasonably calibrate the matter in controvery in dollars," it would be too speculative to take jurisdiction.

In addition, "the federal courts can not take cognizance under §1331 of cases where the rights are not capable of valuation in monetary terms. And, the jurisdictional test is applicable to that amount that flows directly and with a fair degree of probability from the litigation." Kheel v. Port of New York Authority, supra at 49. See also Rosado v. Wyman, supra. With respect to the questions of whether the value of the right at issue meets the jurisdictional requisite, or whether it is too speculative to value, there is a line of cases involving questions of employment that parallel the case at bar.

In Marshall v. Crotty, 88 F. Supp. 30 (1950) aff'd 185 F.2d 622, plaintiff asked for declaratory relief from his dismissal as an employee of the U. S. Veterans Administration. His complaint was dismissed for lack of jurisdiction ($3000). The Court concluded that if plaintiff could show that he had been deprived of employment sufficiently long to earn at least $3000 (his annual salary was $4400), then "the requisite amount in controversy would be properly set forth. On the contrary, it appears ... that any right of

employment which plaintiff had was not so definite character as to substantiate a claim that it was worth $3000." at 34. In the instant case, plaintiffs never achieved a position from which they have been fired. They are at least one step, maybe two, removed from plaintiff in Marshall, who was himself without right to employment.

C. PLAINTIFFS COULD NOT RECOVER AN AMOUNT IN EXCESS OF THE JURISDICTIONAL REQUIREMENT.

Plaintiffs, in citing St. Paul Indemnity Co. v. Red Cap Co., 303 U.S. 283 (1938) asserts at 16 of their brief that if certain jobs "had been made available" and if they "obtained" these jobs, then, they might have derived economic benefit, in excess of $10,000. Plaintiffs do not say whether the $10,000 would be the difference from what they earn now, or could earn by taking another job; nor do they specify from where the $10,000 comes. -- The argument is based on "ifs", not certainty.

Moreover, and more importantly, St. Paul does not stand for the position as asserted by plaintiffs,

but merely holds the the inability of plaintiff to recover the amount claimed as the jurisdictional requisite, will not show bad faith by plaintiff, or will not oust jurisdiction.

Admittedly, St. Paul might appear to shift the burden back on the defendant when the Court, at 289, states that "if from the face of the pleadings it is apparent, to a legal certainty, that the plaintiff can not recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that plaintiff never was entitled to recover that amount... the motion will be dismissed." However, what the court is really saying is that once the plaintiff has been challenged on the jurisdictional question, the determination of whether there is a certainty that plaintiff can not recover an amount in excess of the jurisdictional requisite becomes part of the overall evaluation in answering the jurisdictional question.

D. PLAINTIFFS' CLAIMS ARE SEPARATE AND DISTINCT CLAIMS, AND THEREFORE ARE NOT SUBJECT TO THE AGGREGATION RULE.

Finally, if plaintiffs individually do not meet the jurisdictional requirement should their claims,

if any exist, be aggregated as plaintiffs maintain. Plaintiffs rely heavily on the case of Bass v. Rockefeller, 331 F. Supp. 945 (1971).

Bass involved a group of medicaid recipients that had a common and undivided interest, in that their claim was totally integrated. Each member had a particular claim for some medicaid benefits, and if one was to receive any benefits, they all would. Thus, the Court held these claims not to be separate and distinct, and fall within Snyder v. Harris, 394 U.S. 332 doctrine, denying aggregation.

Clearly, in looking at the two tests set out in Bass at 950, the answer as to whether the instant case falls within the aggregation rule has to be answered in the negative.

First, "the interest in distribution test," is applied to see whether the adversary has any interest in how claims might be distributed. In Bass, it did not matter who got what medicaid payment. Here, it certainly matters as to who gets what job. The Merit System would have a distinct role in helping to determine that decision as well as the fact that not all potential applicants would qualify for positions, and

there would be a limited number of them available. Jobs are not distributed equally or uniformly as are welfare benefits. There are no inherent rights to jobs, as there are to welfare. See Goldberg v. Kelley, 397 U.S. 254 (1969); Shapiro v. Thompson 394 U.S. 618 (1969).

Secondly, the "essential party test" allows aggregation when none of the class members could bring suit without directly affecting the right of his co-parties. Here, the suit does not affect anyone else's right, and, as will be discussed below, this is not a class action.

Bass can also be distinguished because it was brought and maintained as a class action. Each member has a claim that was substantially similar to that of the other and if one prevailed, they all did. Here, even assuming if the action were maintained as a class action, if one member prevails and secures additional availability of jobs, and in fact secures a job for himself, it would not necessarily follow that other members would be successful.

The recent case of Zahn v. International Paper Co. 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973)

reaffirming the Snyder, supra, doctrine of aggregation, clearly sets out the difference between those claims that are separate and distinct, and those that are common and undivided. It follows from Zahn that if members of a class each have to evidence that their claim exceeds the jurisdictional requirement, then plaintiffs can not use the aggregation doctrine of Bass, when this is not a class action. Whose claims are they aggregating? Likewise, Berman v. Narragansett Racing Ass'n., 414 F.2d 311 (1969), is distinguished from plaintiffs' claim, as put below, see opinion at A-56, because there is no status of stakeholder in the case at bar. Again, even assuming the State should have a more encompassing subprofessional employment program, it would be pure speculation to say that plaintiffs would benefit from such.

IV.

CONCLUSION

This Court should affirm the District Court's Opinion that the matter in controversy did not meet the jurisdictional requirement of being in excess of ten thousand dollars.

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of Appellee's brief upon Douglas Molde, Esq., attorney for the Appellant, by posting copies of same in a United States mail receptacle, first class mail, addressed to his last known office address, Vermont Legal Aid, Inc., 54 Lake Street, Box 589, St. Albans, Vermont, 05478, on this 9th day of May, 1974.

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